



ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

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FEDERAL COMMUNICATIONS COMMISSION
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Ms. Marlene H. Dortch
Federal Communications Commission
445 12th Street, S.W., Room 1-A836
Washington, D.C. 20554

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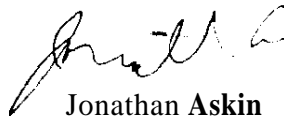
Re: Notice of *Ex Parte* Submission in CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

Pursuant to Section 1.1206(b) of the Commission's Rules, please find attached for inclusion in the record in the above-referenced proceedings a letter to Bill Maher, Chief of the Wireline Competition Bureau, from Jonathan Askin on behalf of the Association for Local Telecommunications Services.

If you have any questions about this matter, please contact me at 202-969-2587

Respectfully submitted,



Jonathan Askin

FROM THE DESK OF:
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 14, 2002

William F. Maher, Jr.
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex Parte Letter*
WCB Docket Nos. 01-338, 96-98, 98-147

Dear Mr. Maher:

In paragraphs 70-71 of the UNE Triennial Review NPRM, the Commission sought comment on the “co-mingling” and “significant local usage” restrictions currently applicable to circuits converted from special access to UNE combinations. In response, numerous parties called for the removal of such restrictions citing a variety of legal and policy positions.⁷ This letter is intended to provide additional support for this position, as well as our views on how, if imposition of certain use restrictions on converted circuits was still deemed necessary by the Commission, such use restrictions may be more tailored to better serve the purposes previously identified by the Commission and to avoid unintended consequences that run counter to important Commission policy objectives. Thus, in plain terms, this letter reaffirms our support for the removal of all use restrictions (“Plan A”), but also offers some insights into a “Plan B”, in case our “Plan A” position does not prevail. This letter also reaffirms our position that, even if the Commission deems it necessary to apply some sort of modified use restrictions on conversions of special access to enhanced extended links (“EELs”), use restrictions should not apply to new EELs (ordered directly as UNE combinations) or to standalone UNEs.

Plan A – Removal of Restrictions on Converted Circuits

See Comments of NuVox, KMC Telecom, e.spire, TDS MetroCom, MFN and SNIp LINK, CC Docket Nos. 01-338, 96-98, 98-147 (filed Apr. 5, 2002) at 49-52, 98-101 and Cadieux Affidavit (attached thereto) ¶¶ 14-17; Reply Comments of NuVox, KMC Telecom, TDS MetroCom, CoreTel and SNIp LINK, CC Docket Nos. 01-338, 96-98, 98-147 (filed Apr. 5, 2002) at 46-52 and Cadieux Reply Affidavit (attached thereto) ¶ 7; Comments of Competitive Telecommunications Associations, CC Docket Nos. 01-338, 96-98, 98-147 (filed Apr. 5, 2002) at 90-103; Comments of WorldCom, CC Docket Nos. 01-338, 96-98, 98-147 (filed Apr. 5, 2002) at 80-81 and Reply Comments (filed Jul. 17, 2002) at 30-36; Reply Comments of NewSouth, CC Docket Nos. 01-338, 96-98, 98-147 (filed Jul. 17, 2002) at 33-38. *See also* Comments of ALTS, Cbeyond, DSLNet, El Paso Networks, Focal, New Edge Network, Pac-West, Paetec, RCN Telecon, and US LEC, CC Docket Nos. 01-338, 96-98, 98-147 (filed Apr. 5, 2002) at 99-106, Comments of NewSouth, CC Docket Nos. 01-338, 96-98, 98-147 (filed Apr. 5, 2002) at 37-46.

Since EELs became available through the process of converting existing special access circuits to UNE combinations, a number of competitive LECs have had some success using converted EELs to extend the reach of their networks and thereby expanding competitive choices and broadband to a significantly greater number of end users that could not be reached otherwise. Through this process, small business customers have upgraded from incumbent LEC analog service to competitive LEC broadband services provisioned over an “integrated T1” using UNEs and competitive LEC-provisioned facilities.² Circuits converted to EELs also contribute to competitive LECs’ ability to make more efficient use of existing facilities and to justify the business case for additional expenditures on new facilities. Converted EELs also ease the burdens that collocation places on both incumbent LECs and competitive LECs. These, and other benefits, however, have been only partially realized. Indeed, realization varies by competitive LEC and by incumbent LEC, with some competitive LECs being able to take advantage of the three enumerated “safe harbors” – at least some of the time – while other competitive LECs could not; and with the incumbent LECs complying with their conversion obligations to varying degrees and at various times.

The temporary use restrictions currently in place are the primary reason why realization of the benefits of converting special access circuits to EELs has been limited. The restrictions have blocked many competitive LECs from converting circuits despite the fact that such circuits are used to provide local services to end users. In some cases, competitive LECs have groomed their networks to engineer around the co-mingling restrictions but, in other cases, competitive LECs have determined that such re-engineering and additional construction was not practical or could not be cost justified. In some cases, customer need for broadband data services also have prevented conversions of special access to EELs, since the “voice” requirements in the safe harbors result in a patently anti-broadband and anti-wholesale bias.

Then, of course, are the numerous incumbent LEC ploys to deny conversion requests or to make them so problematic that a competitive LEC would have to “think twice” before requesting them. These ploys have come in various forms, including but not limited to: artificial collocation requirements, conversion processes that are cumbersome and even service-degrading for what should be a simple billing/records change, and attempts to extract grossly excessive non-recurring charges:⁷

Time is now more than “up” on the temporary use restrictions the Commission put in place to protect (1) ILECs from reductions in special access revenue from long distance carriers and an alleged loss of universal service subsidies built into the current transitional ILEC access charge regime, and (2) facilities-based competitive access competition. There is no compelling evidence that the existing restrictions remain necessary or that even more narrowly tailored restrictions are needed.

ILECs have responded (albeit, belatedly), by launching their own integrated TI offerings. *See, e.g.*, “SBC Introduces Flexible, Cost-Effective Unified Voice and Data Access for Business”, SBC Communications, Inc., Press Release, Oct. 8, 2002. Thus, this is yet another case of where unbundling has led to innovation, facilities investment and end user broadband access.

¹ Comments of NuVox, KMC Telecon, e.spire, TDS MetroCom, MFN and SNIPLINK, CC Docket Nos. 01-338, 96-98, 98-147 (filed Apr. 5, 2002) at 51-52 and Cadieux Affidavit (attached thereto) ¶ 12.

The special access circuits that most competitive LECs seek to convert to UNEs have no apparent impact on universal service subsidies today or on the ability of facilities-based competitive access providers to compete for the business of the large IXC's. We are now well into the CALLS access regime transition and Bell companies are now poised to receive 271 authority in roughly two-thirds of all states by year end (states representing a far more significant proportion of the population).⁴ In addition to new interLATA revenues,⁵ incumbent LEC revenues also have been bolstered by a variety of policies (at least some of which are patently unlawful) that have forced competitive LECs to order special access instead of UNEs.⁶ In practice, the restrictions have forced continued reliance on special access by competitive LECs and increased reliance on special access by incumbent LECs. As a result, incumbent LECs, in recent years, have realized tremendous growth in revenues and profits attributable to special access.⁷ Neither competition nor consumers benefit from this, as the boon in demand for incumbent LEC special access services has kept incumbent LEC revenues, profits and prices artificially high, and has had no direct impact on universal service goals or the competitive access market. In short, having received far more than the anticipated benefit of their 1996 Act bargain, the Bells' special access gravy train – which has become a runaway gravy train in recent years – should be called into the station as it no longer needs nor merits regulatory protection.⁸

Plan B – Tailoring Use Restrictions to Better Serve their Intended Purpose

Now, if the Commission determines that the record compels retention of certain restrictions on competitive LECs' ability to convert special access to UNE combinations (in spite of competitors' being impaired without access to such UNE combinations), it seems undeniable that practical experience confirms that the "significant local usage" and "co-mingling"

Term plan commitments also have preserved incumbent LEC revenues, as associated termination penalties would for some competitive LECs outweigh the benefit to be achieved by converting special access circuits to UNEs.

For Verizon alone, Section 271 authority has resulted in more than a billion dollars in new revenues. AT&T *Ex Parte* CC Docket Nos. 01-338, 96-98 and 98-147, at 2 (Oct. 29, 2002).

See, e.g., Comments of ALTS, Cbeyond, DSLNet, El Paso Networks, Focal, New Edge Network, Pac-West, Paetec, RCN Telecom, and US LEC, CC Docket Nos. 01-338, 96-98, 98-147 (filed Apr. 5, 2002) at 107-117 (arguing that Verizon's "no facilities" policy is unlawful), *see also* Response of Allegiance, to Verizon *Ex Parte* in Docket Nos. 01-338, 96-98, 98-147 (Sep. 30, 2002), Response of ALTS, Allegiance, Focal, XO, and MPower to Verizon *Ex Parte* in Docket Nos. 01-338, 96-98, 98-147 (Sep. 12, 2002).

For 2001, the Bells' special access rates of return were 54.6% for SBC, 49.26% for BellSouth, 46.58% for Qwest, 37.08% for Verizon (excluding NYNEX), and 21.72% for Verizon. SBC's special access returns in 2001 exceeded amounts that would have produced an 11.25% rate of return by at least \$2.5 billion. For the same year, Verizon reaped such special access windfalls of more than \$1 billion; BellSouth's special access windfall was nearly \$1 billion; and Qwest's special access windfall was more than \$700 million. AT&T Special Access Petition, RM No. 10593 at 8 (filed Oct. 15, 2002).

The Bells' special access revenues have more than tripled since 1996. *Id.* at 4. Indeed, the Bells' revenues and returns have risen in every year since 1996 and have done so most dramatically since the FCC adopted its EEL conversion restrictions in 1999. *Id.* at 8, 14-15.

See, e.g., Reply Comments of NuVox, KMC Telecom, TDS MetroCom, CoreTel and SNiP LiNK at 46-52.

constraints adopted by the Commission have had unintended, deleterious and unnecessary consequences.” Competitive LECs that provide telephone exchange, exchange access and advanced/broadband services to their customers in direct competition with incumbent LECs often have been unable to avail themselves of the existing safe harbors. Moreover, many of those that have availed themselves of the safe harbors have been harassed by unauthorized audit requests that serve no purpose other than to drain competitors’ scarce resources.” Thus, it would be imperative for the Commission to establish more tailored and less burdensome restrictions that are easily understood and applied and which do not work to the detriment of the Commission’s important policy objectives of promoting competition and access to broadband.

To create a more narrowly tailored rule to serve the Commission’s stated goals, the Commission should change the focus away from a demonstration of certain percentages of “local” service or an exclusive provider of local service benchmark and instead define the restriction so that it does no more than protect the legacy access charge revenues associated with legacy long distance voice services. In the UNE Remand decision and its progeny, the Commission’s stated concerns appeared directly related to how interexchange carriers (“IXCs”) must obtain and pay for exchange access. Presumably, the access revenues generated by such carriers (special and switched) supported universal service and presented facilities-based competitors with an opportunity to compete for such revenues. Competitive LECs (**like** competitive access providers and incumbent LECs), however, provide their own exchange access or provide it jointly with other LECs. Unlike a carrier that is exclusively an IXC, competitive LECs seek to use UNEs to provide both telephone exchange and exchange access services, unless access to UNEs is sought to provide broadband services that may be classified as exchange access services, rather than telephone exchange services. Yet, concerns were raised that “IXCs” could skirt the legacy access charge regime by acquiring UNE combinations between their own switches and those of the incumbent LECs.

Since most competitive LECs are also IXCs (often via resale), any use restriction adopted should more appropriately focus on those carriers that use special access exclusively for legacy interexchange voice traffic. This approach would be consistent with the Commission’s rules regarding cost-based interconnection under Sections 251 and 252. In that context, the Commission has found that a carrier is not entitled to cost-based interconnection at TELRIC rates, if it seeks such interconnection exclusively for the exchange of interexchange traffic.¹² The Commission’s ruling was affirmed by the Eighth Circuit.¹³ Following that model, the Commission could restyle its current use restriction so that it bars the conversion of circuits used by carriers that are exclusively IXCs. In anticipation of LEC objections that an IXC can obtain status as a competitive LEC without having to provide local exchange services (regardless of a

¹⁰ *Id.*

¹¹ BellSouth has taken to harassing its competitors with frivolous EEL audit requests that simply do not comply with the constraints imposed on such audits by the Commission. *E.g.*, NuVox Inc. Petition for Declaratory Ruling, CC Docket 96-98 (filed May 17, 2002).

¹² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶ 191; *see also id.* ¶¶ 176; 184-85, 190 (“*Local Competition Order*”).

¹³ *See Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068, 1072-73 (8th Cir. 1997) (“*CompTel*”).

lack of validity), such a restriction can be tightened by styling the restriction as one that bars conversions of circuits that are connected to switching equipment used exclusively to provide interexchange voice services or that are used exclusively to serve a customer for which the requesting carrier provides no local or broadband services.

This restriction would not include a co-mingling restriction. The current co-mingling restriction is not needed to serve the Commission's stated goals. Indeed, this two-headed malevolent monster (two headed in the sense that the co-mingling restriction has morphed into a restriction that bars (1) sharing facilities with tariffed services and (2) connection to a tariffed service) – is anti-competitor overkill. Moreover, it inhibits the efficient use of network inputs, creates perverse incentives for the construction of inefficient and balkanized networks, and protects tariffed services for which there are no competitive alternatives and that do not generate contributions to universal service.

The restriction also would not include a collocation requirement. Subject to a rebuttable presumption, whereby an incumbent LEC could overcome the presumption by demonstrating that a requesting carrier operates exclusively as an interexchange voice carrier, the restriction would not apply when a circuit terminates to a requesting carrier's collocated facilities.

Critically, even if the Commission deems it necessary to apply some sort of modified use restrictions on conversions of special access to EELs, such use restrictions should not apply to new EELs (ordered directly as UNE combinations) or to standalone UNEs. Since competitive LEC new EEL orders do not result in the substitution of UNE combinations for existing special access, incumbent LEC legacy special access revenues are not implicated by new EELs. Indeed, we now have had several years experience with incumbent LECs providing unrestricted access to EELs in markets where they have made EELs available as a result of their election to avail themselves of the circuit switching exemption and in a number of states that have ordered statewide access to new EELs without imposing the use restrictions that the FCC imposed on conversions from special access to EELs. That experience demonstrates that there has been no resulting collapse in ILEC special access revenues, universal service funding, or facilities-based exchange access competition in those markets. In fact, the record contains no evidence of any detrimental impact in this regard caused by unrestricted access to new EELs. Thus, without evidence of need for restrictions or substantial detriment in their absence, it is clear that competitive LECs face impairment and must continue to have unrestricted access to new EELs and standalone UNEs.¹⁴

¹⁴ In the wake of the Supreme Court's *Verizon* decision, *Verizon Communications v. FCC*, 122 S. Ct. 1646, 1661 (2002) ("*Verizon*"), several incumbent LECs have attempted to impose the use restrictions adopted by the Commission in the *Supplemental Order Clarification* to new EELs, even though they had not previously required certification with one of the three safe harbors for new EELs made available pursuant to the Commission's circuit switching exemption or state proceedings. The Commission, however, has never imposed use restrictions on new EELs, as its circuit switching exemption requirement for the provisioning of new EELs was instituted without condition and the "new" combinations rules restored by the Supreme Court had also been adopted without condition. Accordingly, incumbent LECs' unilateral efforts to impose the *Supplemental Order Clarification* use restrictions to new EELs and standalone UNEs are in violation of Rule 51.309(a), which bars incumbent LECs from placing restrictions on UNEs. See, e.g., Reply Comments of NuVox, KMC Telecom, TDS MetroCom, CoreTel and SNIPLINK at 48-50. More recently, at least one incumbent LEC has suggested that the DC Circuit's recent opinion affirming the

Finally, ALTS requests that the Commission reject incumbent LEC attempts to limit or deny competitive LECs' ability to convert special access to standalone UNE loops or transport segments. Six years into the unbundling regime, it remains the case that competitive LECs are often forced to order special access instead of UNEs initially to ensure that customer need can be timely met. Although incumbent LEC provisioning of UNEs has improved over the past six years, it is by no means uniformly predictable or reliable. In addition, incumbent LECs increasingly have replaced operational impediments with self-created policy impediments. The most recent and famous of these is the "no facilities" gambit developed by Verizon and embraced by its siblings.¹⁵ Regardless of the reason for ordering special access, competitive LECs must continue to have the ability to convert such circuits to UNEs and their subsequent use of UNEs must remain unrestricted. Again, there is no compelling need or policy justification for imposing restrictions on the use of UNEs where impairment exists. Carriers have been converting special access circuits to standalone UNEs for years and ILEC special access revenues have not fallen off a cliff, nor is there any evidence that universal service funding or Facilities-based access competition have been compromised.

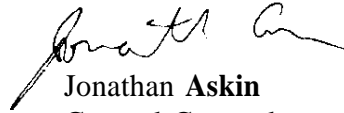
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ALTS would welcome any questions the Commission has with respect to this submission and respectfully request that the Commission recognize that ALTS does not support the imposition of restrictions on circuits converted from special access to EELs – or on new EEL combinations, conversions of special access to standalone UNE loops and transport, or any other UNEs. Indeed, ALTS opposes use restrictions on numerous grounds, and merely suggests a way in which the existing use restrictions could be more narrowly tailored (thereby limiting the adverse effects on competitors and end users), if the Commission supports the continued imposition of use restrictions on conversions of special access to EELs.

FCC's *Supplemental Order Clarification* and the use restrictions imposed therein, **Competitive Telecomms. Ass'n v. FCC**, No. 00-1272, 2002 WL 31398290, (D.C. Cir. Oct. 25, 2002) ("*CompTel-DC*") lends support to its view that those restrictions apply outside the context of special access conversions to UNE combinations. However, that simply cannot be the case. In *CompTel-DC*, the DC Circuit merely affirmed the FCC's imposition of use restrictions in the limited context in which they were imposed. The DC Circuit did nothing to expand their application to new EELs. Nor could it have done so, because the Commission in its UNE Remand proceedings (including the *Supplemental Order* and *Supplemental Order Clarification*) refused to address new combinations outside the context of the voluntary circuit switching exemption. See, e.g., Reply Comments of NuVox, KMC Telecom, TDS MetroCom, CoreTel, and SNIPLINK at 48-50.

¹⁵ See, e.g., Comments of ALTS, Cbeyond, DSLNet, El Paso Networks, Focal, New Edge Network, PacWest, Paetec, RCN Telecom, and US LEC, CC Docket Nos. 01-338, 96-98, 98-147 (filed Apr. 5, 2002) at 107-117.

Respectfully submitted,



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